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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(San Joaquin)

THE PEOPLE,

Plaintiff and Respondent,

v.

JENNA LOUISA ROJAS GARCIA et al.,

Defendants and Appellants.

C084496

(Super. Ct. Nos.
MANCRFECOD20160006039,
MANCRFECOD20160006040)

In this consolidated appeal, defendants Jenna Louisa Rojas Garcia and Johnny James Wolchow challenge their convictions for first degree residential burglary and attempted first degree burglary. Defendants each contend they were improperly convicted of both completed burglary and attempted burglary; the People concede. The People also agree with defendants' contention that the trial court incorrectly calculated their presentence custody credits. Defendants further contend the trial court erred in excluding a portion of a statement by a companion as inadmissible hearsay. We will

strike the attempted burglary conviction, remand for the trial court to recalculate the custody credit, and otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On April 29, 2016, the victim was at home in the house she shared with her father. Behind the house was a dirt lane and an orchard. The house had no rear fence.

The victim noticed a man (later identified as Samuel Botchvaroff) trying to open a glass door to a back bedroom. Scared, the victim called her father, who confirmed that no one was scheduled to work in the backyard that day. The victim walked to the kitchen and watched Botchvaroff walk from the back door to a truck parked in the back of the house. A minute later, Botchvaroff returned with a crowbar and two companions, defendants. As Botchvaroff resumed trying to pry open the door, the victim called 911. Meanwhile, defendants walked toward the front door. Garcia rang the doorbell and knocked, while Wolchow stood on the steps. The victim stayed silent inside and watched defendants return to the truck. The victim heard Botchvaroff still trying to pry open the sliding glass door, and she tried to hide.

Police arrived at 10:06 a.m. An officer found Botchvaroff at the rear of the house, trying to pry open the sliding glass door with a large tool. The locking mechanism was partially damaged. Botchvaroff complied with the officer's orders to drop his tool and get on the ground. Botchvaroff was handcuffed and taken into custody.

A pickup truck was parked 10 yards from the sliding glass door, with the driver's side door open. Defendants were sitting in the truck and each complied with the officer's requests to get out of the truck and get on the ground. Both were taken into custody at 10:11 a.m. In the back of the truck, police found a large tote bag with gloves sitting on top and tools inside. Police also found a backpack near where Wolchow was sitting.

Inside was a sweatshirt and various tools, including a tool to separate a doorjamb and a metal “slim jim,” which could be used to help unlock a door. The sweatshirt appeared to fit Wolchow. Garcia’s purse was also found in the truck. Police later verified that Botchvaroff had rented the truck.

During the January 2017 trial, Garcia testified that the day before the incident, she had asked her friend Wolchow to help her find a ride to the Bay Area the following day. Wolchow arranged for Botchvaroff to drive them. Garcia met Botchvaroff through his mother but did not consider him a friend. He irritated Garcia, and she had only seen him four times in the eight years she had known him.

The morning of the incident, Botchvaroff unexpectedly drove in a different direction and stopped in an alley, explaining he was visiting someone. He left the keys in the ignition. After waiting in the truck for 10 minutes, defendants got out to look for Botchvaroff. Garcia eventually tried knocking three times on the door of a nearby home, but no one answered, so she resumed walking down the street to find Botchvaroff. Garcia eventually returned to the truck.

The next thing Garcia knew, the police approached the truck and she was arrested. She was unaware of Botchvaroff’s actions until she heard someone say “robbery in progress” over the police radio. Garcia denied planning any burglary with Botchvaroff.

Prior to trial, under Evidence Code section 1230, Wolchow sought to introduce two statements Botchvaroff made to police soon after his detention that, according to Wolchow, indicated Wolchow was not involved in the crimes: (1) “This truck is a rental and everything in it is mine;” and (2) “This is on me. They just came along for the ride.” Wolchow argued Botchvaroff was unavailable and the statements were against his own interest because they implicated him in criminal conduct. Garcia joined in the motion, and the prosecution stipulated to Botchvaroff’s unavailability.

The trial court held admissible Botchvaroff's statements that "The truck is a rental and everything in it is mine" and "This is on me," reasoning they were against his penal interest. The trial court excluded Botchvaroff's statement that "They just came along for the ride" because it was not inculpatory as to Botchvaroff. The trial court questioned the reliability of the statement because it was "exculpatory as to the two co-defendants." The admissible statements were introduced to the jury through the testimony of responding officers.

A jury found defendants guilty of first degree burglary and attempted first degree burglary. The jury also found Wolchow guilty of possession of burglary tools.

In March 2017, the trial court sentenced Garcia to state prison for an aggregate term of four years, as follows: four years for burglary and two years for attempted burglary, stayed pursuant to Penal Code section 654. The trial court imposed mandatory fees and fines and awarded 126 days of custody credit (63 days of actual credit plus 63 days of conduct credit).

The trial court sentenced Wolchow to state prison for an aggregate term of six years, as follows: six years for burglary, three years for attempted burglary, stayed pursuant to Penal Code section 654, and 180 days concurrent in county jail for possession of burglary tools. The trial court imposed mandatory fees and fines and awarded 260 days of custody credit (130 days of actual credit plus 130 days of conduct credit), although it noted it might recalculate and revise the amount after reviewing the probation report. The abstract of judgment reflected 278 days of custody credit (139 days of actual credit plus 139 days of conduct credit).

Based on Wolchow's request, in September 2017 the trial court revised the award to 304 days of custody credit (152 days of actual credit plus 152 days of conduct credit). Later that month, Wolchow requested two additional days of custody credit, based on two

partial days of custody in which he was arrested or released, but the trial court denied that request.

Garcia and Wolchow filed timely appeals.

DISCUSSION

I

Conviction Of Both Burglary And Attempted Burglary

As the parties agree, a defendant may not be convicted of both a greater offense and a necessarily included lesser offense for the same conduct. (*People v. Sanders* (2012) 55 Cal.4th 731, 736.) Because attempted burglary is a necessarily included lesser offense of burglary (*People v. Michaels* (1961) 193 Cal.App.2d 194, 198), defendants could not legally be convicted of both. Accordingly, we will strike the attempt convictions.

II

Hearsay Statement To Police

Defendants contend the trial court erred in excluding Botchvaroff's statement to police that "They just came along for the ride." According to defendants, the entire statement ("This is on me. They just came along for the ride.") is against Botchvaroff's penal interest because it makes clear that Botchvaroff was solely responsible for the burglary. (Evid. Code, § 1230.) In the alternative, defendants also contend the statement is admissible pursuant to the federal constitutional right to present a defense, pursuant to *Chambers v. Mississippi* (1973) 410 U.S. 284 [35 L.Ed.2d 297]. We find no error.

"Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, . . . so far subjected him to the risk of . . . criminal liability, . . . that a reasonable man in his position would not have made the statement unless he believed it to be true." (Evid. Code, § 1230.) We review a trial court's finding

that a statement is not admissible under Evidence Code section 1230 for abuse of discretion. (*People v. Grimes* (2016) 1 Cal.5th 698, 711-712.)

A defendant seeking to admit an out-of-court declaration as a declaration against interest “ ‘must show that the declarant is unavailable, that the declaration was against the declarant’s penal interest when made and that the declaration was sufficiently reliable to warrant admission despite its hearsay character.’ ” (*People v. Grimes, supra*, 1 Cal.5th at p. 711.) “ ‘In determining whether a statement is truly against interest within the meaning of Evidence Code section 1230, and hence is sufficiently trustworthy to be admissible, the court may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant’s relationship to the defendant.’ ” (*Ibid.*)

We need consider only whether the statement implicated Botchvaroff’s penal interest and was sufficiently reliable, given the parties’ agreement during trial that Botchvaroff was unavailable to testify.

Although Botchvaroff did not implicate his penal interest when he told police “They were just along for the ride,” this portion of the statement tended to exculpate defendants. (*People v. Grimes, supra*, 1 Cal.5th at p. 715 [courts may “consider whether the portion of a confession that tends to exculpate another, rather than to shift blame or curry favor, should be admitted [under Evid. Code, § 1230] in view of surrounding circumstances, even though the exculpatory portion of the statement is not independently disserving of the declarant’s interests”].)

Botchvaroff had known Garcia for eight years and met her through his mother. He was sufficiently close to both defendants that he agreed on a day’s notice to drive the two to the Bay Area in his rented truck. Botchvaroff also trusted them enough to leave the keys to the truck in the ignition while he was trying to break into the victim’s home. Given their long-standing relationship, Botchvaroff had an incentive to protect his friends

and attempt to exonerate the two to police. (See *People v. Grimes*, *supra*, 1 Cal.5th at p. 716 [exculpatory portions of a statement may be inadmissible where the declarant has an incentive to protect his friends].) Under the circumstances, we find no error.

Given our conclusions, we also reject defendants’ argument that the exclusion of Botchvaroff’s partial statement violated their constitutional right to present a defense. Although a defendant has a “fundamental” right to present evidence in his own defense, “[i]n the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.” (*Chambers v. Mississippi*, *supra*, 410 U.S. at p. 302 [35 L.Ed.2d at p. 313].) As such, “ ‘[a] defendant does not have a constitutional right to the admission of unreliable hearsay statements.’ ” (*People v. Ayala* (2000) 23 Cal.4th 225, 269.)

III

Custody Credits

Defendants each argue the trial court miscalculated their custody credits because they spent additional actual days in custody that were not included in the trial court’s calculation. Garcia argues she is entitled to an additional 15 actual days (or 156 days of total credit), Wolchow argues he is entitled to an additional two actual days (or 308 days of total credit), and the People agree. We will order the trial court to recalculate the custody credits.

DISPOSITION

The judgment against Garcia is modified to strike the conviction for attempted burglary. The matter is remanded for the trial court to recalculate her custody credits. As modified, the judgment is affirmed.

The judgment against Wolchow is modified to strike the conviction for attempted burglary. The matter is remanded for the trial court to recalculate his custody credits. As modified, the judgment is affirmed.

The trial court is directed to prepare amended abstracts of judgment and to forward certified copies to the Department of Corrections and Rehabilitation.

/s/
Robie, J.

We concur:

/s/
Raye, P. J.

/s/
Hull, J.